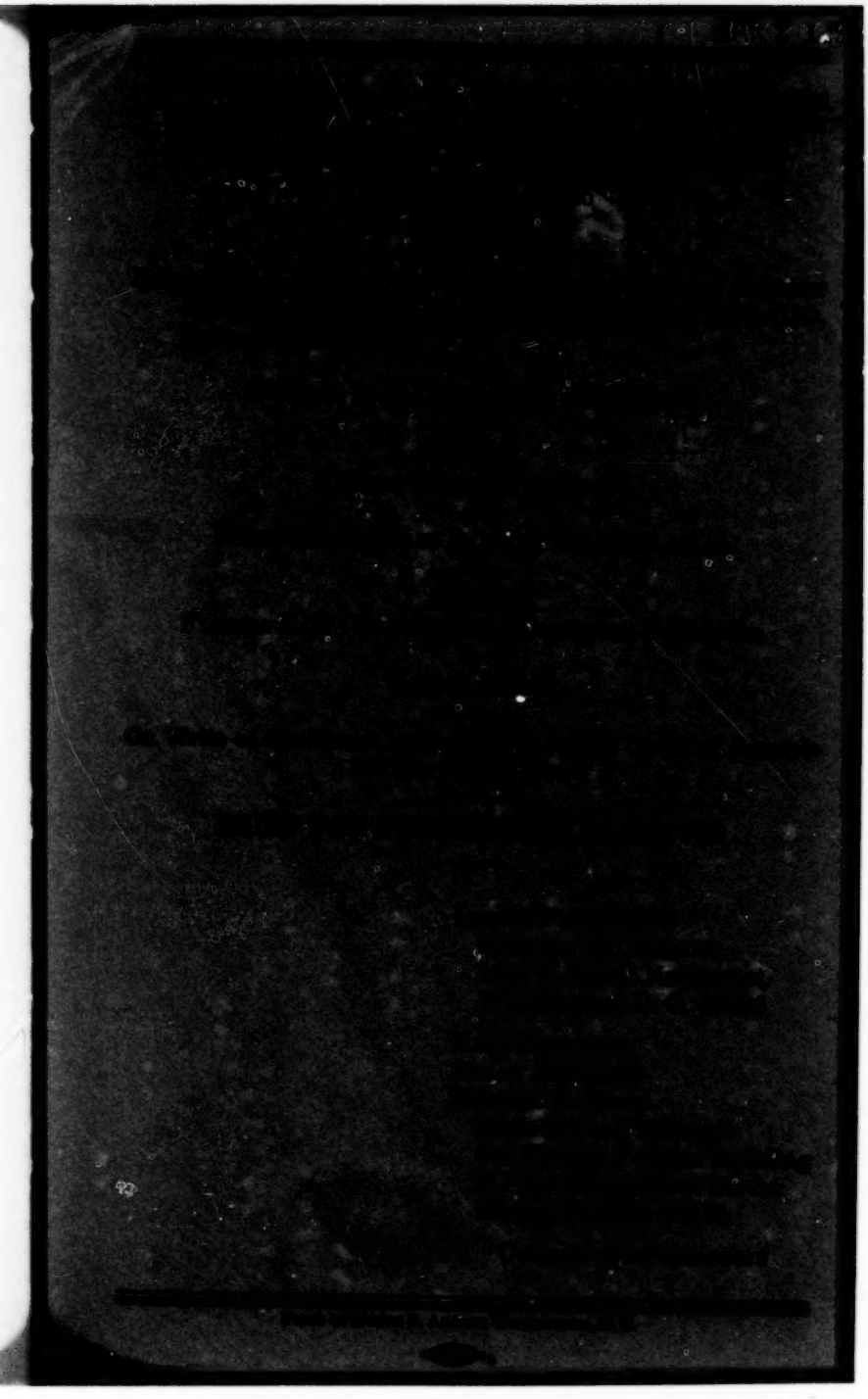

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 750

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, AFL-CIO, ET AL., *Petitioners,*

v.

FLORIDA EAST COAST RAILWAY COMPANY

No. 782

UNITED STATES, *Petitioner,*

v.

FLORIDA EAST COAST RAILWAY COMPANY, ET AL.

No. 783

FLORIDA EAST COAST RAILWAY COMPANY, *Petitioner,*

v.

UNITED STATES

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONERS IN NO. 750

OPINIONS

The opinion of the United States Court of Appeals for the Fifth Circuit is officially reported at 348 F. 2d 682 and is unofficially reported at 59 LRRM 2854; it is reprinted at R. 903-911. The findings of fact and conclusions of law and the injunction of the United States

District Court for the Middle District of Florida, Jacksonville Division, are not officially reported, but the findings of fact and conclusions of law are unofficially reported at 57 LRRM 2618-2622. The findings of fact of the District Court appear in the printed record, Volume I, at R. 180-186; the conclusions of law of the District Court appear in the printed record, Volume I, at R. 186-189; and the preliminary injunction issued by the District Court appears in the printed record, Volume I, at R. 189-191.

JURISDICTION

The judgment of the Court of Appeals was entered on July 21, 1965 (R. 911). Mr. Justice Black thereafter, by orders dated October 15, 1965 (R. 912), and November 18, 1965 (R. 913), extended the time for filing a petition for a writ of certiorari to and including November 29, 1965. The petition for writ of certiorari in Case No. 750 was filed on November 18, 1965; the petitions in Nos. 782 and 783 were filed on November 29, 1965. This Court granted the three petitions on January 24, 1966, and ordered the cases consolidated. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

1. Title I of the Railway Labor Act, as amended, 45 U.S.C. 151-163 [44 Stat. 577 (1926), 48 Stat. 926 (1934), 48 Stat. 1185 (1934), 49 Stat. 1921 (1936), 54 Stat. 785, 786 (1940), 62 Stat. 991 (1948), 63 Stat. 107 (1949), 77 Stat. 132 (1963), 78 Stat. 748 (1964)].

The provisions of Section 2, Seventh; Section 2, Tenth; Section 5, First; and Section 6 of the Railway Labor Act are set forth herein, verbatim, as follows:

Section 2, Seventh (45 U.S.C. 152, Seventh):

"Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title."

Section 2, Tenth (45 U.S.C. 152, Tenth):

"Tenth. The willful failure or refusal of any carrier, its officers or agents, to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000, nor more than $20,000, or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any United States attorney to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: *Provided,* That nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent."

Section 5, First (45 U.S.C. 155, First):

"First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

"(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

"(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

"The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

"In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 160 of this title) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter.

"If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 160 of this title, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose."

Section 6 (45 U.S.C. 156):

"Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board. May 20, 1926, c. 347, § 6, 44 Stat. 582; June 21, 1934, c. 691, § 6, 48 Stat. 1197."

2. The Norris-La Guardia Act, as amended, 29 U.S.C. 101-115 [47 Stat. 70 (1932), 62 Stat. 862 (1948)]. Section 8 of the Norris-La Guardia Act, 29 U.S.C. 108, 47 Stat. 72 (1932), is set forth herein as follows:

"§ 108. Noncompliance with obligations involved in labor disputes or failure to settle by negotiation or arbitration as preventing injunctive relief

"No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who

has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration."

QUESTIONS PRESENTED

1. May a Federal District Court aid a carrier faced with a legal strike, by relieving the carrier from its duty to comply fully with the Railway Labor Act in order to effectuate the carrier's "right to continue to run its railroad under the strike conditions"?

2. Did not the Court of Appeals rule in conflict with a decision of this Court, *Brotherhood of Railroad Trainmen* v. *Toledo, P. & W. R.R.* (1944), 321 U.S. 50, by holding that affirmative federal equitable relief may be granted to a railroad involved in a legal strike even though the railroad has repeatedly rejected voluntary arbitration of the strike issues?

STATEMENT OF THE CASE

Present Litigation

The United States brought this suit in April, 1964, in the United States District Court for the Middle District of Florida, Jacksonville Division, against the Florida East Coast Railway Company[1] to enforce the "status quo" provisions of Section 2, Seventh, and Section 6 of the Railway Labor Act (R. 2-11).[2] The

[1] Hereinafter referred to as FEC.

[2] The printed record in this case consists of three volumes. Volumes I and II contain the pleadings, court orders, and a transcript of the testimony. The third volume, entitled "Exhibit Volume", contains most of the documentary evidence introduced at the hearings, certain excluded exhibits designated for inclusion by the FEC, and the exhibits attached to the Affidavit of Eugene C. Thompson, Executive Secretary of the National Mediation Board,

three-count complaint sought injunctive relief to prohibit the FEC from continuing in effect or implementing (1) a Section 6 Notice of July 31, 1963 (i.e., a notice required under § 6 of the Railway Labor Act), served by the FEC upon eighteen labor organizations proposing to abolish the union shop provisions in its contracts with those organizations; (2) a Section 6 Notice of September 24, 1963, served by the FEC upon seventeen labor organizations proposing a complete revision of all existing rules, rates of pay, and working conditions; and (3) certain "Conditions of Employment" which were also a complete revision of all contracts substantially the same as the September 24, 1963, Section 6 Notice proposal, and which the FEC had promulgated in written form on September 1, 1963, and had put into effect and implemented without serving any Section 6 Notice whatsoever.

The complaint alleged that the two Section 6 Notices had been put into effect while the National Mediation Board[3] had them docketed for mediation and before

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which the trial Court stated without objection would be considered by the Court and, to avoid duplication in the record should not be reintroduced into evidence (R. 278). Volumes I and II are paginated consecutively whereas the Exhibit Volume is paginated independently. References to Volumes I and II will be made by the smbol "R.", e.g., "R. 25"; references to the Exhibit Volume will be made as follows: "Exh. Vol., p. 25." The only significant documents which do not appear in the Exhibit Volume are the many voluminous contracts between the FEC and the non-operating unions (Pl.'s Exh. 4, R. 285), which were already in printed form and were not, by agreement of all parties, reprinted for the Court of Appeals, but, instead, several printed copies of one of the contracts, the Shop Crafts Agreement (Pl. Exh. 4-C, R. 333-334), were supplied to the Court of Appeals as a part of the record. Fourteen copies of this printed Shop Crafts Agreement, plus fourteen copies of three other contracts, have also been supplied to the Clerk of this Court.

[3] Hereinafter referred to as NMB.

the NMB had finally acted upon them under Section 5, First, of the Railway Labor Act, and that the "Conditions of Employment" had been implemented without following any of the procedures required by the Railway Labor Act. The complaint was accompanied by a motion for preliminary injunction (R. 13-16), and an affidavit of the Executive Secretary of the NMB (R. 37-42).

On May 6, 1964, eleven of the eighteen labor organizations referred to in the complaint moved to intervene as additional plaintiffs (R. 43-44). The movants were the eleven so-called "non-operating"[4] unions which had gone on strike against the FEC on January 23, 1963, and are the petitioners in Case No. 750 in this Court.

On May 26, 1964, the FEC filed its answer to the complaint (R. 96-107) admitting many of the factual allegations of the Government's complaint. The case came on for hearing (R. 235) before Chief Judge Bryan Simpson on the Government's motion for a preliminary injunction, the eleven non-operating unions'

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[4] In the parlance of the railroad industry, "operating" unions are unions representing crafts which actually operate trains (e.g., engineers, conductors, trainmen, brakemen, firemen, switchmen, hostlers, and yardmen) while "non-operating" unions represent other crafts involved in the railroad business (e.g., clerks, maintenance-of-way employees, signalmen, telegraphers, machinists, etc.). Since dissolution of Eugene V. Debs' American Railway Union after the Pullman strike of 1894, the railroad industry has been overwhelmingly organized along "craft" rather than "industrial" lines. The exceptions to this pattern usually involve only small railroads owned and operated by industries, such as the steel industry, which are organized on an industrial basis. The FEC's Section 6 Notice of September 24, 1963, and its "Conditions of Employment" virtually abolish all craft lines.

petition to intervene, and various FEC defensive motions [e.g., motion to dismiss, (R. 108); motion to stay, (R. 50); motion to continue, (R. 56)]. The petition to intervene was granted at the outset after argument (R. 243); the motions to stay and to continue were denied (R. 244-249); and the motion to dismiss was carried with the case (R. 267-269).

For three days (May 26-May 28, 1964) the District Court received testimony and evidence on the motion for a preliminary injunction (R. 275-592). At the conclusion of the hearing the Court announced it would delay ruling for a reasonably short time to see if the Court of Appeals might render its decision soon in a pending companion case (*Florida East Coast Ry. Co.* v. *Brotherhood of Railroad Trainmen,* 336 F. 2d 172, cert. den., 379 U.S. 990)[5] involving many of the same issues (R. 588-589).

The Court of Appeals ruled in the *Trainmen's* case on August 18, 1964.[6] Thereafter, upon receiving supplemental memoranda from the parties (R. 141, 151), the District Court on October 30, 1964, rendered its Findings of Fact and Conclusions of Law (R. 180-189) and its Preliminary Injunction (R. 189-191) in this case. The relief granted was substantially as sought in the complaint except that the FEC, pursuant to the *Trainmen's* decision, was granted permission to apply to the Court for specific authorization to make changes in rules, rates of pay, and working

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[5] Hereinafter referred to as the *Trainmen's* case.

[6] The Opinion in the Trainmen's case is reproduced in Appendix C to the Government's petition for certiorari in No. 782, pp. 26a-44a.

conditions without following Railway Labor Act procedures during the pendency of the current strike upon a finding by the Court of a "reasonable necessity therefor" (R. 190-191, par. (e)).

On November 12, 1964 (before the injunction took effect), an Application of Defendant [FEC] for Approval of Employment Practices was filed (R. 216) supported by affidavits (R. 195, 203, 211) claiming that the effect of the injunction, if no deviations were permitted, would be to reduce the FEC's business by from 30% to 50% (R. 196, 206, 214) and possibly "to stop the operation of the railroad immediately and completely" (R. 206). The District Court continued a stay of its injunction until hearing on the application (R. 222-223). The hearing came on November 30, 1964 (R. 593) and continued for three days (R. 593-898). The FEC's Application was opposed by both the United States and Intervenors (R. 868-878, 879-882).

On December 3, 1964, an Order was entered granting portions of the FEC's application and denying others (R. 223-225).[7] Both the FEC and the United States appealed from the preliminary injunction and the Order of December 3, 1964 (R. 225, 234).

On appeal all parties made a frontal assault on the ruling in the *Trainmen's* decision. The FEC renewed its contention that its operations during the non-operating unions' strike were exempt from the pro-

[7] The time limits in the Order of December 3, 1964, have since been extended by the District Court and all of the exceptions granted are still in effect.

hibitions of the Railway Labor Act[8] and that the District Court was without jurisdiction to enforce the Act. The United States and Intervenors argued that the so-called "reasonably necessary" exceptions doctrine enunciated in the *Trainmen's* decision should be reconsidered and receded from as contrary to both the language and the policy of the Railway Labor Act. The United States also reasserted (R. 869) that the FEC was barred by the doctrine of unclean hands from seeking the affirmative equitable relief involved in the "reasonably necessary" exceptions doctrine, and Intervenors urged that the FEC, having repeatedly declined voluntary arbitration, was barred from seeking affirmative equitable relief under the decision of this Court in *Brotherhood of Railroad Trainmen* v. *Toledo, P. & W. R.R.*, 321 U.S. 50 (1944).

On July 21, 1965, the Court of Appeals rendered its decision affirming the injunction and the Order of December 3, 1964, in all respects and declining to modify its earlier ruling in the *Trainmen's* case (R. 903-911). These petitions for a writ of certiorari followed and were granted on January 24, 1966 (R. 915).

Statement of Facts

The background leading up to this case is extensively set forth in the Report to the President by Emergency Board No. 157 (Exh. 17 to Affidavit of Eugene C.

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[8] This argument is sometimes loosely referred to as the "*contract* suspension" argument. Actually, and more accurately, it is a "*statute* suspension" argument since it is the statute, more than the mere contracts, which requires carriers by rail to preserve existing rules, rates of pay, and working conditions unless changed in accordance with the statute's prescribed procedures. *Manning* v. *American Airlines*, 329 F. 2d 32 (2 Cir. 1964), cert. den., 379 U.S. 817.

Thompson, Exh. Vol., pp. 451-506; R. 278). Briefly summarized, the dispute began on September 1, 1961, with the Intervenors serving a Section 6 Notice on the FEC and all other Class I railroads seeking a 25¢ per hour across the board pay raise (R. 456) and six months' advance notice of any reduction in force or abolition of a position (R. 495-497). To this the carriers responded with a counter-proposal reducing rates of pay by 20% and eliminating all rules requiring more than twenty-four hours' notice of any reduction in force or abolishment of a position (R. 498-500).

The dispute was negotiated on a national basis[9] until the FEC on February 9, 1962, withdrew from the Southeastern Carriers Conference and announced that it would not be bound by any settlement reached on a national basis (Exh. Vol., p. 456; R. 844). Shortly thereafter the national bargaining was settled in con-

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[9] It has been customary in the railroad industry for collective bargaining to be conducted on a national basis, i.e., with the carriers and the organizations bargaining through national or regional conferences or committees and reaching uniform agreements applying to all. The reasons for this pattern of bargaining are well set forth in the Report to the President by Emergency Board No. 157 (Exh. Vol., pp. 471-472). Basically, as stated by a carrier spokesman, they involve "the extraordinary degree to which railway employees from different carriers * * * are thrown together in their work, * * *" and "* * * the fact that employee morale and stable and harmonious labor relations can be maintained, and endless turmoil and strife avoided, only if uniform and nondiscriminatory adjustments are made in the rates of pay and in the rules governing the compensation and working conditions of all classes and crafts of employees * * *" (Exh. Vol., pp. 471 and 472). Both the carriers and the organizations have traditionally advocated national handling (Exh. Vol., p. 471), albeit after passage of Public Law 88-108 in 1963 imposing compulsory arbitration on a national level for the first time during peace in this Nation's history, many of the labor organizations are reconsidering their position in this regard.

formity with the recommendations of Emergency Board No. 145 on the basis of a 10.28¢ per hour across the board wage increase and a five working day notice requirement for abolishing jobs (Exh. Vol., pp. 455-456). This soon left the FEC as the only Class I railroad in the country which did not accept the recommendations of Emergency Board No. 145 (Exh. Vol., p. 456).

Meanwhile, bargaining with the FEC proceeded to a stalemate (Exh. Vol., pp. 457-458); both sides rejected arbitration as proffered by the NMB (Exh. Vol., p. 457); and on January 23, 1963, the non-operating employees represented by Petitioners struck (Exh. Vol., p. 458).

The FEC ceased operations due to the strike from January 23 to February 5, 1963, when it operated its first post-strike train from Jacksonville to Miami (R. 394-396). Thereafter, the FEC gradually recruited a work force (Def.'s Exh. II, Exh. Vol., pp. 219-220; Def.'s Exh. BB, Exh. Vol., pp. 167-168; R. 718, 657) until by May, 1964, the FEC had working approximately fifty percent of its pre-strike force, in terms of numbers (R. 381), and was handling approximately 95% of its pre-strike carload freight capacity (R. 361, 363, 371, 379-380, 386), albeit it was not handling less-than-carload freight (R. 380, 397) or any passenger service (R. 802, 353, 367, 755-757; Exh. 17, Exh. Vol., pp. 459-460).[10]

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[10] The FEC did not restore any passenger service until after the Florida Public Utilities Commission's original order requiring it to do so was quashed by the Florida Supreme Court and a more restricted PUC order entered. See *Florida East Coast Ry. Co.* v. *Mason*, Fla., July 14, 1965, 177 So. 2d 217.

Meanwhile, continuing Government efforts to bring about a settlement of the dispute were unsuccessful. Requests that the parties agree to voluntary arbitration were renewed by the Secretary of Labor in April and May of 1963 (Exh. Vol., p. 459). This time the striking unions accepted the requests, but the FEC refused both times (Exh. 17 to Thompson Affidavit, Exh. Vol., p. 459; R. 278).

Due to the fact that the FEC, under contract with N.A.S.A., was constructing a spur which would be the sole railroad link into the complex of defense and space program installations on Cape Kennedy (then Cape Canaveral) and Merritt Island (Exh. Vol., pp. 454, 459-462, 491), the Government's concern about the dispute grew sharper. In September 1963, President Kennedy ordered a special Federal Inquiry Board to investigate the dispute (Exh. Vol., pp. 501, 460). The Board found the dispute to be "currently and potentially detrimental to our Nation's defense and space efforts" (Exh. Vol., p. 460), and recommended resumption of negotiations and voluntary arbitration (Exh. Vol., p. 460). President Kennedy, on receipt of the report, reiterated his concern, asked the NMB to renew its efforts, and requested to be kept advised (Exh. Vol., p. 504). The NMB's further mediation efforts were not successful, and again the NMB proffered arbitration (Exh. 17 to Thompson Affidavit, Exh. Vol., p. 461; R. 278). Again the unions accepted (Exh. Vol., p. 461). Again the FEC rejected the proffer (Exh. Vol., p. 461).

One of the last official acts of President Kennedy was the creation of Emergency Board No. 157 by Executive Order No. 11127 (Exh. Vol., pp. 491-492).

The Board convened on November 20, 1963, recessed on November 23 for ten days in mourning for the death of President Kennedy, and filed its report with President Johnson on December 23, 1963 (Exh. Vol., pp. 451-490). The unions have agreed and do now agree to accept the report's recommended basis for settlement; the FEC refuses.

Meanwhile, as described above, the FEC was expanding its work force and resuming the most profitable phase of its business, carload freight. In doing so, however, it did not work the employees in either the striking crafts or the non-striking crafts[11] according to the rules, rates of pay, or working conditions as embodied in their existing contracts, but instead, as admitted in FEC's answer (R. 102-103), used "the manpower available to it in whatever manner required to provide service to the public." These radically different rules, rates of pay, and working conditions were finally codified by the FEC on September 1, 1963, under the title "Conditions of Employment" (Pl.'s Exh. 2, Exh. Vol., pp. 4-35; R. 276-277), and each employee was required to sign a receipt for such Conditions agreeing individually "to work thereunder." (Pl.'s Exh. 4A, Exh. Vol., p. 75; R. 283-284). It is clear that the Conditions of Employment were the exclusive rates of pay, rules and working conditions for the people showing up for work, both prior to September 1, 1963, and thereafter, until the FEC put into effect certain Section 6 Notices

[11] The employees in the non-striking crafts mostly honored the strikers' picket lines. However, this was not 100% the case, as admitted by FEC in its answer (R. 102, par. 8). The non-striking unions left this decision up to the individual worker (e.g., R. 487, 484-488).

hereafter discussed (R. 289-302, 342-343, 289-351). It is also clear that the Conditions of Employment are different from the various existing contracts (R. 103, 289-290, 327, 331, 334, 335); that the contracts themselves make no provision for such "emergency" measures (R. 324); and that under the Conditions of Employment craft lines were abolished (Pl.'s Exh. 2, Exh. Vol., p. 5; R. 276-277), seniority rights changed (R. 327, 331), safety provisions eliminated (R. 334), pay rates altered (R. 335), and a 6-day week instituted when deemed needed by the railroad (Pl.'s Exh. 2, Exh. Vol., p. 19; R. 276-277).

After putting the Conditions of Employment in written form on September 1, 1963, the FEC next incorporated almost all of their provisions into a Section 6 Notice dated September 24, 1963, which it served upon the seventeen non-operating crafts (R. 320; Exh. 12 to Thompson Affidavit, Exh. Vol., pp. 399-440; R. 278). This September 24, 1963, Section 6 Notice, also called "The Uniform Working Agreement" (Exh. Vol., pp. 402, 38), is "fundamentally the same" (R. 343) although not identical with the prior Conditions of Employment (R. 312-317). And on September 25, 1963, a similar Section 6 Notice was served by the FEC on the operating crafts (Pl.'s Exh. 3, Exh. Vol., pp. 36-74; R. 281-282). In sum, the Uniform Working Agreement proposed under Section 6 to the operating crafts on September 25, 1963; the Uniform Working Agreement proposed under Section 6 to the non-operating crafts on September 24, 1963; and the Conditions of Employment previously put into operation by the carrier as to all crafts after the strike and reduced to writing on September 1, 1963, are all substantively and in form

about the same (R. 319; compare Pl.'s Exh. 2, Exh. Vol., pp. 4-35; R. 276-277 with Pl.'s Exh. 3, Exh. Vol., pp. 36-74; R. 281-282 and with Exh. 17 to Thompson Affidavit, Exh. Vol., pp. 399-440; R. 278).

In regard to the non-operating crafts, the carrier proposed an initial conference on its September 24, 1963, Section 6 Notice for October 18, 1963 (Exh. Vol., p. 400). The parties all met on October 18, but the conference broke up over a dispute concerning the FEC's insistence that the bargaining session be transcribed verbatim by a court reporter (Exh. Vol., pp. 400, 444-446).[12] Within ten days thereafter, the unions invoked the mediation services of the NMB by letter dated October 23 (Exh. 12 to Thompson Affidavit, Exh. Vol., pp. 399-402; R. 278) and by telegram on October 25, 1963 (Exh. 10 to Thompson Affidavit, Exh. Vol., p. 397; R. 278). The NMB in turn notified the FEC by telegram on October 25, 1963, that the unions had invoked mediation and cautioned the FEC about the provisions of Section 6 of the Railway Labor Act (Exh. 11 to Thompson Affidavit, Exh. Vol., p. 398). Nevertheless, the FEC on October 28, 1963, replied to the NMB that it was going to place its September 24, 1963, Section 6 Notice into effect anyway because the unions had terminated the prior conference over the presence of the court reporter and had thereby lost their right "to avail themselves of services of the

[12] In this regard, it should be noted that the NMB in mediation sessions has usually followed a practice of banning verbatim transcripts as too formal for effective bargaining on a give and take basis. See R. 531, 561-562. When the FEC insisted on recording a mediation session, over the protest of the mediators, the mediators likewise withdrew from the meeting (R. 521-522).

Mediation Board" (Exh. 13 to Thompson Affidavit, Exh. Vol., pp. 440-441). Two days later, on October 30, 1963, the FEC formally placed its Section 6 Notice of September 24, 1963, into effect as to sixteen crafts (Exh. 14 to Thompson Affidavit, Exh. Vol., pp. 442-446; R. 278).[13] The next day, October 31, 1963, the NMB again advised the FEC by telegram that it had assumed jurisdiction of the case and that Section 6 of the Railway Labor Act applied (Exh. 15 to Thompson Affidavit, Exh. Vol., pp. 446-447). The FEC continued undeterred on its course of action (R. 97-98, 286, 318) and maintained its Section 6 Notice of September 24, 1963, in effect from October 30, 1963, until enjoined in this case (R. 318).[14]

A similar history in all respects occurred in regard to the other Section 6 Notice here involved which was served by the FEC on July 31, 1963, upon those unions which had union shop provisions in their contracts, proposing to cancel such agreements (Exh. 1 to Thompson Affidavit, Exh. Vol., pp. 376-379). The initial conference held on August 29, 1963, aborted over the court reporter issue and a timely request for NMB mediation was made by the unions (Pl.'s Exh. 1,

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[13] One of the 17 crafts served with the Notice, the International Association of Railway Employees, proceeded to meet with the FEC after the October 18th conference aborted and did not join in the other unions' request for its services to the NMB (Exh. 16 to Thompson Affidavit, Exh. Vol., pp. 448-449; R. 278; R. 97, par. 6).

[14] Without detailing the facts it is sufficient to say that substantially the same events occurred in regard to the September 25, 1963, Section 6 Notice proposing the Uniform Working Agreement to the operating crafts, and the FEC implemented it as to all such crafts except the Trainmen (who continued to meet despite the court reporter) on November 4, 1963, over the protest of the NMB and the unions. (R. 281-282, 287-318, 296-297, 344-349; Pl.'s Exhs. 7 and 8, Exh. Vol., pp. 81-84; R. 305, 310.)

Exh. Vol., pp. 1-3; R. 261-263). The NMB advised the FEC of this fact on September 9, 1963 (Exh. 6 to Thompson Affidavit, Exh. Vol., p. 389), but the FEC wrote back that it had cancelled the agreements on September 9, 1963, and would continue to treat them as cancelled (Exh. 7 to Thompson Affidavit, Exh. Vol., pp. 390-393). The NMB formally protested this FEC action (Exh. 8 to Thompson Affidavit, Exh. Vol., pp. 394-395) but the FEC in response merely reiterated its position (Exh. 9 to Thompson Affidavit, Exh. Vol., pp. 395-396).

Summary

In summary, the evidence showed conclusively that the FEC, since resuming operations in February, 1963, had completely ignored all the requirements of the Railway Labor Act in regard to maintaining or changing rules, rates of pay, and working conditions both as to those crafts on strike and those not on strike. The FEC stated candidly that if enjoined in this case from keeping its Section 6 Notices of July 31, 1963, and September 24, 1963, in effect, it would then "revert" to the Conditions of Employment (R. 325, 311) which are merely the same thing by a different name.

In regard to the effect of applying the Railway Labor Act provisions to its operations under strike conditions, the FEC's chief witness (its vice-president in charge of personnel, R. W. Wyckoff, R. 275-276) conceded that the Act's restrictions would not have prevented the railroad from operating entirely, but would have severely curtailed its operations (R. 330):

> "Q. But you could have operated on a reduced basis, I take it, if you tried to comply?

"A. Mr. Shapiro, we certainly have an obligation to perform to the greatest degree possible the service which the public needs require and is entitled to receive.

"Q. You didn't answer my question.

"A. I thought I did.

"Q. The question was: You could have operated on a reduced basis if you had complied, could you not?

"A. It would have been a very reduced basis and it would not have been fulfilling our obligation to the public.

"Q. But you could have operated?

"A. On a very restricted basis, yes."

The effect of applying the Railway Labor Act's provisions, undiluted, on the railroad's present operations was variously estimated by FEC witnesses as requiring a 30% to 50% reduction in its current volume of business (R. 196, 206, 214, 219, 381, 367, 354, 771, 863). While the FEC has, and has had since October, 1963 (R. 361-367), sufficient manpower to operate at 95% of capacity under the Conditions of Employment and the September 24, 1963, Uniform Working Agreement (R. 312), it lacks sufficient numbers of skilled and experienced craftsmen so as to work its personnel "as required by the agreements" (R. 214), and therefore finds it an "enormous saving" to cross craft lines (R. 682, 207-208, 213), to use supervisors for scope work (R. 399, 567, 740, 754), to contract out (R. 215), to ignore apprentice ratios (R. 208, 211-214), etc. The FEC has had little success in recruiting experienced employees from other railroads (R. 713-714) and finds the task of training its replacement

force a lengthy and difficult one (R. 197-202, 370-371, 625-626, 661, 714, 739). The task is complicated by "a good bit of turn-over" (R. 685).

Obviously, and as admitted by the FEC's President, undiluted compliance with the provisions of the Railway Labor Act will substantially "affect the ability of the Railroad to withstand this strike" (R. 762).

Companion Litigation

A. Federal Labor Injunctions Obtained by the FEC

Since the Court of Appeals for the Fifth Circuit has enunciated the "reasonably necessary" exception to the Railway Labor Act in this dispute for the first time in the Act's 40-year history, and since the purpose in so doing as expressed by that Court in the *Trainmen's* case is to accommodate the law so as to make "effectual" the railroad's "right to operate" (336 F. 2d at 181), it is relevant to know what other accommodations have been made by federal courts in this dispute concerning management's "right to operate" and labor's "cherished right to strike" (336 F. 2d at 181).

The FEC's main line runs, generally speaking, from Jacksonville to Miami (Exh. 17 to Thompson Affidavit, Exh. Vol., pp. 453-454). On the north end, through the Jacksonville Terminal Company (which is owned, operated and controlled by the FEC together with the other railroads),[15] the FEC connects with four other railroads; on the south end it connects with the Broward County Port Authority Belt Line Railroad

[15] See *Florida East Coast Ry. Co.* v. *Jacksonville Terminal Co.*, 328 F. 2d 720 (5 Cir., 1964).

which services Port Everglades, the largest deep water port in South Florida, situated just a few miles north of Miami. Within 4½ months after the strike began on January 23, 1963, the FEC obtained two federal court injunctions which completely destroyed the efficacy of any lawful, peaceful picketing at these key interchange points. In neither case was there any charge of improper, unruly or violent picketing; in neither case were the striking unions made parties or given advance notice of the proceedings. The injunctions were issued, insofar as the unions were concerned, ex parte. In both cases the injunctions were entered in suits brought by the FEC against its connecting carriers *only* and the injunctions obtained compelled the carriers "and their officers, agents, servants, *and employees*" (emphasis added) to accord the FEC full interchange and switching services. The effect of the injunctions was to require the connecting carriers' employees to cross the FEC's employees' picket lines or to perform car service and all other services for the FEC on the Terminal Company premises. In Miami, the unions learned about the injunction when it was served upon the employees; in Jacksonville the injunction was posted at the Terminal Company employee bulletin board.

The injunction in Jacksonville was entered on January 30, 1963, by Judge McRae in Case No. 63-16-Civil, *Florida East Coast Railway Company* v. *Jacksonville Terminal Company, Atlantic Coast Line Railroad Company, Seaboard Air Line Railroad Company, Southern Railway Company, and Georgia Southern and Florida Railway Company.* The injunction in Miami was entered on June 5, 1963, by Chief Judge Dyer in Case No. 63-282-Civil, *Florida East Coast Railway Company* v. *Broward County Port Authority.*

In Miami the unions were permitted to intervene in the proceedings; a motion to dissolve the injunction based upon the Norris-La Guardia Act and this Court's decision in *Brotherhood of Railroad Trainmen* v. *Toledo, P. & W. R.R.*, 321 U.S. 50 (1944), was denied; and some two years later the injunction was reversed for lack of jurisdiction in *Brotherhood of Locomotive Firemen and Enginemen* v. *Florida East Coast Railway Co.*, 346 F. 2d 673 (5 Cir., June 8, 1965). The injunction was not formally lifted until July 30, 1965. Although the suit in Jacksonville has still not proceeded beyond the preliminary injunction stage, and no final hearing has yet been held or even scheduled, the unions' petition to intervene in that case, made after the Court of Appeals' decision in the Miami case, has been denied and is on appeal. A declaratory judgment suit to construe the injunction and its legal effect if any upon the unions and employees is also pending before the District Court.

While ruinous in their effect on the strike both injunctions have been obeyed and honored in all respects. No charge of violation has ever been made.

Thus blocked from anything more than token picketing at the FEC's two main interchange points, two of the striking unions, the Order of Railroad Telegraphers (now Transportation-Communication Employees Union) and the Brotherhood of Maintenance of Way Employes, commenced very limited picketing at the Cape Kennedy spur of the FEC, on which FEC traffic, according to its President, "has increased tremendously and * * * [is] going to increase substantially" (R. 393). Pickets were established for two days in September, 1963, and resumed for two days in February, 1964, and for two days again in June, 1964. On the latter two occasions, the National Labor Re-

lations Board obtained temporary injunctions restraining the picketing under Section 10(l) of the National Labor Relations Act, 61 Stat. 146, 73 Stat. 544, 29 U.S.C. 160(l), on the basis that the Maintenance of Way Employes and Telegraphers' unions, which represent only employees in the railroad industry, were guilty of an unfair labor practice under the National Labor Relations Act as agents for all the other striking FEC unions. The NLRB subsequently adopted this view in ruling on the merits of the charge (Member Jenkins dissenting), 150 NLRB No. 37; the Court of Appeals for the District of Columbia affirmed per curiam (Chief Judge Bazelon dissenting), 350 F. 2d 791; and the case is currently pending in this Court on petition for certiorari filed January 17, 1966 (Case No. 918, October Term, 1965, *International Brotherhood of Electrical Workers, AFL-CIO, et al.*, v. *NLRB*).

In summary, peaceful picketing during the first 2½ years of this strike has been effectively enjoined and restrained by federal court orders at the three principal places on the FEC's system where it could be expected to have any economic effect sufficient to induce the carrier to make any efforts to settle the controversy.

B. Other Litigation

Since the strike began in early 1963, the FEC repeatedly has been found in violation not only of federal statutes, but of specific injunctions against it enforcing those statutes. These violations were brought to the attention of the trial court (R. 869) and in many cases were known to the Court from its own experience in companion cases.

In *United States* v. *Florida East Coast Ry. Co.*, (D.D.C., May 7, 1963), 221 F. Supp. 325, the FEC was

found in violation of Section 10 of the Railway Labor Act and enjoined to comply with its status quo requirements. Actually, as shown by the evidence in this case, its ad hoc operations continued unchanged and unaffected by the injunction.

In *United States* v. *Florida East Coast Ry. Co.* (M.D,. Fla., nunc pro tunc to date or oral ruling, December 12, 1963), 55 LRRM 2798, the FEC was found in violation of the status quo requirements of P.L. 88-108, 77 Stat. 132.[16] Actually, as shown by the evidence in this case, its operations under the Conditions of Employment continued unchanged and without variation despite the injunction (R. 296-297, 869).[17]

In the *Trainmen's* case the original injunction of March 2, 1964 (55 LRRM 2561) was stayed by the Court of Appeals two weeks later, and the modified injunction entered after receipt of the mandate after the Court of Appeals' decison of August 18, 1964, became effective October 9, 1964. Thereafter the FEC was found by Chief Judge Simpson on two separate occasions, December 7, 1964, and February 12, 1965,

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[16] P.L. 88-108 also appears in the current pocket supplement to 45 U.S.C.A. 157.

[17] At the trial in that case in December, 1963, the FEC's chief personnel officer had testified to the Court that if enjoined, "We would revert to the last duly negotiated rules, which were those in effect prior to November the 4th [1963]" (R. 300). The witness did not advise the Court or say anything about the Conditions of Employment promulgated unilaterally on September 1, 1963, and, in fact, the railroad did not revert to any "duly negotiated rules" after the Court's oral injunction (R. 296-303). FEC's counsel's assertion that he told the Department of Justice's attorney about the "Conditions of Employment" at that time (R. 297) was directly refuted by the Government attorney who tried both cases (R. 560).

after full scale hearings, to be in "deliberate and willful" violation of the injunction and in contempt of court. Civil Case 64-40-Civil-J, M.D. Fla., *Brotherhood of Railroad Trainmen* v. *Florida East Coast Ry. Co.*

In November, 1964, the FEC was again found to be in violation of the Railway Labor Act and enjoined therefrom in *Brotherhood of Locomotive Engineers* v. *Florida East Coast Ry. Co.* (M.D. Fla. 1964), 57 LRRM 2641, stay denied, 341 F. 2d 99, 58 LRRM 2283. On September 24, 1965, the FEC was found in civil contempt of this injunction, 60 LRRM 2292.

Likewise, FEC violation of the Act was enjoined on January 6, 1965, in Case No. 64-237-Civil-J, M.D. Fla., *Order of Railroad Conductors* v. *Florida East Coast Ry. Co.,* and a contempt order in this case was only recently entered against the FEC an February 28, 1966.

Finally, in *Florida East Coast Ry. Co.* v. *Gamser,* M.D., Fla. 1965, Case No. 65-165-Civil-J, the FEC's application for injunctive relief against the NMB was denied on May 28, 1965, on the specific finding that the FEC had failed to approach the mediation conference table in good faith.

C. Summary

In summary, the role of the federal courts in this dispute, the longest railroad strike in the Nation's history, can hardly be described as a retiring one. An observer may wonder, however, whether any of this multitudinous litigation would have resulted, or been necessary, had the first injunction of January 30, 1963, against picketing at the FEC's key northern link with the rest of the nation not been rendered. As pointed

out by the railroad's President, "the Railroad is completely isolated" if that link is broken (R. 790). Even semi-isolation caused by legitimate, peaceful picketing at the Jacksonville Terminal might have effected a change in the FEC's attitude toward good faith mediation or voluntary arbitration.

SUMMARY OF ARGUMENT

The Railroad's contention that during a strike the provisions of the Railway Labor Act are suspended, and the Court of Appeals' ruling that during a strike a federal court may create judicial exceptions to the Railway Labor Act, are contrary to the plain language and the underlying policy of the Act. They have no support in the statute's legislative history. Neither deviation from the literal language of the Act should be judicially created. Both doctrines undercut fundamental policies of the Railway Labor Act: (1) compulsory mediation; (2) voluntary arbitration; and (3) preservation of the status quo so as to confine existing disputes within their original limits and prevent them from escalating into irreversible conflagrations.

Analogies loosely drawn from National Labor Relations Act cases are as apt to mislead as they are to guide. The policies and scheme of the two federal labor statutes are different. Congress has ample justification for legislating in a different way for the railroad industry from the way it legislates for other businesses affecting interstate commerce generally.

In any event, the decisions under the NLRA do not support the exceptions here claimed and defended.

Courts should not substitute their views as to a proper adjustment of the economic balance of power

for those adopted by Congress, especially in an area directly involving the public interest and national defense.

If judicial exceptions to the Railway Labor Act are to be created, they should be limited rather than broad in nature. Therefore, the Court of Appeals' "reasonably necessary" exceptions doctrine is sounder than the "statute suspension" contention urged by the Railroad.

If the "reasonably necessary" exceptions doctrine of the Court of Appeals is to be followed, it should be harmonized with the policies of the Railway Labor Act and the Norris-La Guardia Act. The affirmative equitable relief and benefits of such doctrine should not be available to a party that has rejected voluntary arbitration and has flouted the procedures of the Railway Labor Act.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE RAILWAY LABOR ACT FORBIDS EITHER SUSPENSION OF THE STATUTE DURING A STRIKE OR JUDICIALLY-CREATED EXCEPTIONS TO THE STATUTE DURING A STRIKE.

The language of the Railway Labor Act is plain and unmistakeable:

> "Section 2, Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 6 of the Act." 45 U.S.C. 152, Seventh.

The willful failure or refusal to comply with this provision is a federal crime. 45 U.S.C. 152, Tenth.

Here, as stated by the Court of Appeals in the *Trainmen's* decision, 336 F. 2d at 179, a railroad has

instituted wholesale changes "with no pretense at compliance with the Act." The action of the FEC flies squarely in the teeth of the statute. It is suggested that the reason the questions here presented are first arising some forty years after the statute's enactment is that no other carrier has had the termerity to act in such bold contravention of a federal law. The evasive rationalization for such action by the FEC's Vice President and Director of Personnel in this case (R. 287-351), and his misleading if not blatantly false testimony in the earlier case brought by the United States in December, 1963 (R. 296-302, 560), further suggests that the course of action undertaken by the FEC was not the product of naivete, but a deliberate undertaking in violation of clear statutory language. Due respect for law and order would command that a party embarking on such a course of action, at the very minimum, not conceal its nature when questioned about its conduct in a federal court by the United States. But despite extensive questioning by the United States' attorney in December, 1963, on the subject of the FEC's then current practices, not so much as a single reference was made by any FEC witness to its formally promulgated "Conditions of Employment" which were at that very time in effect for the craft of trainmen and which had been the rules in effect for the other operating crafts prior to November 4, 1963 (R. 296-302, 560). Instead the FEC's witness testified under oath as follows (R. 300):

> "Q. And am I correct, Mr. Wyckoff, that if the rules which were put into effect on November 4, 1963, were to be withdrawn, that the previously existing arrangements would be placed in effect, would govern the employment, would govern the rates of pay, rules and working conditions of the

employees in the crafts or classes who are presently operating your trains;"

"A. We would revert to the last duly negotiated rules, which were those in effect prior to November the 4th."

FEC's lack of candor in regard to its actions taken in violation of the plain language of a federal criminal law is at least indicative that the FEC itself, at one time, thought the plain statutory language meant exactly what it says.

II. LEGISLATIVE HISTORY OF THE RAILWAY LABOR ACT DOES NOT SUPPORT THE STATUTE'S SUSPENSION EITHER IN WHOLE OR IN PART DURING A STRIKE.

Ever since the 1870's Congress has been vitally concerned with the matter of labor disputes in the Nation's railroad industry. Recognizing the dire consequences that the public as well as the parties suffer when labor-management relations break down in this key area of our economy, Congress has repeatedly struggled with the problem of providing a fair method of settling such disputes consistent with freedom and our traditions. Perhaps no other subject has come before the Congress so repeatedly and so persistently over so long a period. Public Law 88-108, approved August 28, 1963, 77 Stat. 132, is a recent example. The first legislation, providing for voluntary arbitration and public investigations, was passed in 1888. 25 Stat. 501. Between those dates, Congress applied its attention to the problem repeatedly—in the Erdman Act of 1898, 30 Stat. 424; the Newlands Act of 1913, 38 Stat. 103; Title III of the Transportation Act of 1920, 41 Stat. 469; and then the Railway Labor Act of 1926, 44 Stat. 577, thereafter amended in 1934, 48 Stat. 1186,

in 1948, 62 Stat. 909, and in 1951, 64 Stat. 1238. Hardly a decade has elapsed without the need for Congressional attention.

With this almost continual Congressional attention to the matter of labor disputes in the railroad industry, the volume of legislative history is understandably immense. Certainly Congress in its repeated concern with the subject was not, ostrich-like, unaware of the fact that strikes do still occur in the industry. Yet in all the litigation arising out of this current dispute, the FEC has failed to discover any legislative history even remotely supporting its theory that Congress intended the Railway Labor Act to be automatically suspended, or subject to fragmentary and temporary judicial repeal, during the existence of a strike. The Court of Appeals referred to none in either its *Trainmen's* opinion or the decision in this case. No other court has ever referred to any. It is respectfully submitted that this significant silence in the legislative history activates the canon of statutory construction applied by this Court in construing Section 3, First, of the Railway Labor Act in *Brotherhood of Railroad Trainmen* v. *Chicago R. & I. R. Co.*, 353 U.S. 30, 34-35 (1957), where the Court said:

> "If the Brotherhood is correct, the Adjustment Board could act only if the union and the carrier were amenable to its doing so. *The language of § 3, First, reads otherwise and should be literally applied in the absence of a clear showing of a contrary or qualified intention of Congress.*" (Emphasis added.)

III. THE BASIC POLICIES AND SCHEME OF THE RAILWAY LABOR ACT ARE DEFEATED BY EITHER ITS SUSPENSION OR JUDICIAL INTERFERENCE WITH ITS OPERATION DURING A STRIKE.

Among the general purposes of the Railway Labor Act, as stated by Congress, is the purpose: "(4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules or working conditions." 45 U.S.C. 151a(4).

The means by which the Act attempts to achieve this purpose are clear. Section 2, First (45 U.S.C. 152), enjoins carriers to exert every reasonable effort to make and maintain agreements concerning working conditions (*not* every effort to free itself on a wholesale basis from all existing agreements as the Conditions of Employment and Section 6 Notices of September 24 and 25, 1963, attempt to do). Carriers must file with the NMB copies of their current contracts, and if no contract exists, a statement must be filed as to what rates of pay, rules, and working conditions have been made effective. § 5, Third (e), 45 U.S.C. 155, Third (e). Existing conditions as embodied in agreements are then stamped by § 2, Seventh, with the imprimatur of law[18] and may not be changed except by following specific and clearly defined procedures. These pro-

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[18] See *Manning* v. *American Airlines*, 329 F. 2d 32 (2 Cir. 1964), cert. den., 379 U.S. 817. As the opinion by Judge Friendly (who had an extensive experience with the Act prior to assuming the Bench) makes clear, it is the law and not the contract which requires that conditions be preserved and maintained. For this reason contracts in the railroad industry seldom even contain a meaningless termination clause, whereas contracts in NLRA industries are almost invariably for a specific term only, and indeed, are legally effective in certain respects only for a comparatively short time. See *Leedom* v. *International Brotherhood of Elec. Wkrs.*, 278 F. 2d 237 (D.C. Cir., 1960).

cedures are set forth plainly in Section 6, 45 U.S.C. 156; Section 5, First, 45 U.S.C. 155; and Section 10, 45 U.S.C. 160. They provide for the parties to spell out their requested changes in a "written notice"; for the parties to meet at least once by themselves in conference; for the NMB then to be notified so it may use its best efforts, by the delicate art of mediation, to bring the parties to agreement; for voluntary arbitration if mediation is unsuccessful; and finally, for a cooling-off period while an impartial public Board appointed by the President studies the dispute and makes a report which will form the basis for focusing the power of public opinion on the merits of the matter.

Underlying all of these procedures is the categorical requirement repeated over and over again in the Act (§ 2, Seventh; § 2, Tenth; § 5, First; § 6; and § 10) that pending exhaustion of these procedures no change shall be made, except by agreement, in the conditions out of which the dispute arose.

The whole thrust of the Act is to confine and refine a dispute to its narrowest dimensions. Preservation of the status quo is indispensable lest mediation and voluntary arbitration become mere paper tools.

On the other hand, the doctrine of statutory suspension urged by the FEC, and its companion doctrine of "reasonably necessary" exceptions to the Act, as adopted by the Court of Appeals, operate in precisely the opposite direction. They serve to expand the dispute. The present case is a clear example. What started out as a simple 25¢ an hour wage claim for 11 crafts got refined down under the Act's procedures to a 10.28¢ wage dispute, but has now been blown up to

such proportions that it literally involves every single rate of pay, rule and working condition as embodied in every single contract on the entire railroad.

Why, if restricting the scope of the dispute before a strike helps to settle it, does expanding the dispute thereafter help to end the strike and terminate the disruption of commerce? How, in any way, does the rule fashioned by the Court of Appeals in this case aid the methods and the procedures of the Act? The judicial gloss engrafted onto the Act by the Court of Appeals throws a monkey wrench into all of the Act's elaborately designed machinery for settling disputes once a single Section 6 proposal, no matter how limited in scope, works its way to the "self-help" stage.

IV. THE NATIONAL LABOR RELATIONS ACT, AND CASES THEREUNDER, ARE INAPPOSITE.

The carrier in its brief below, and the Court of Appeals in its opinions, have referred to the line of employer "self-help" cases decided under the National Labor Relations Act, 29 U.S.C. § 141 et seq., as if those cases buttressed their conclusions to suspend the Railway Labor Act totally or in part during a strike. Petitioners respectfully submit that the major premise of such conclusions is not warranted because the two statutes involved, the NLRA and the Railway Labor Act, are more remarkable for their differences than for their similarity. Both statutes, of course, deal with the general subject of labor-management relations in business subject to federal regulation under the Commerce Clause. Beyond this point the similarity ceases. The two statutes involved entirely different approaches to the subject. Different administrative agencies are set up with different duties and functions to perform.

There is no such thing as "an unfair labor practice" charge under the Railway Labor Act, whereas the great bulk of the NLRB's time and energies are devoted to adjudicating such charges brought against either management or the unions. While the staff and officers of the NLRB work primarily as an enforcement agency, making investigations and policing the conduct of the parties according to what the NLRA makes legal or illegal, no enforcement agency as such exists at all under the Railway Labor Act.

In short, the whole scheme and policy of one Act is irreconcilable and inconsistent with the other. Therefore to apply analogies from cases decided under one Act to cases being decided under the other is at best an inconclusive process. The Railway Labor Act is primarily an instrument of government for the particular and peculiar world of the railroad industry—a world which is like a "state within a state." *Elgin, J. & E. Ry. Co.* v. *Burley*, 325 U.S. 711, 752 (dissenting opinion of Frankfurter, J.). For this reason, even if there were a square holding—a "red cow" case—that during a strike the prohibitions of the NLRA are suspended, and any contracts between the parties disappear, it would be of little value in deciding the issues of this case. Of course, there is no such holding even under the NLRA which does not purport to require that conditions embodied in contracts be maintained without change except under certain limited conditions, i.e., when the specific change desired has been defined and the full procedures of the Act have been exhausted.

For example, the case of *NLRB* v. *MacKay Radio & Telegraph Co.*, 304 U.S. 333 (1938), relied upon by the Court of Appeals, did indeed hold that during an

economic strike[19] an employer may continue his plant operations by hiring permanent employees who need not be discharged to make room for returning strikers. But *MacKay Radio* dealt with a situation where no collective bargaining agreement had yet been concluded. In this context this Court simply said:

> "Although § 13 provides 'Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike', it does not follow that an employer, *guilty of no act denounced by the statute*, has lost the right to protect and continue his business by supplying places left vacant by strikers." 304 U.S. at 345 (Emphasis added).

Obviously the case has no application to this Railway Labor Act situation.

Similarly, another NLRA decision relied upon by the Court of Appeals in formulating its "reasonably necessary" exceptions doctrine is *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221 (1963). There, as here, the employer argued his conduct in giving superseniority to striker replacements was saved from illegality by an overriding business necessity. The Court, however, held in *Erie Resistor* that the NLRB could properly conclude that the granting of superseniority to striker replacements would be contrary to the NLRA's specific protection of concerted activities by employees, and expressly rejected the contention that:

> "* * * conduct otherwise unlawful is automatically excused upon a showing that it was motivated by business exigencies." 373 U.S. at 229

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[19] A term which has great significance under the NLRA but is meaningless under the Railway Labor Act.

Nor do this Court's recent cases exploring the limits of employer self-help under the NLRA bolster the carrier's position in this case. For example, in *Local U. No. 721* v. *Needham Pack. Co.*, 376 U.S. 247 (1964), it was held that a unions' strike in breach of an express no-strike clause in a contract did not operate to terminate or "suspend" the contract so as to relieve the Employer from its obligation under the arbitration clause of the contract.

It is true that this Court reaffirmed its *Erie Resistor* statement in *American Ship Building Co.* v. *NLRB*, 380 U.S. 300 (1965), that determining the legality of an employer's economic measures entails the

> "* * * delicate task * * * of weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner." 380 U.S. at 312.

But no question of judicial or administrative balancing arises in the present case, for Congress has already, by its clear language, decided and prescribed the answer to the precise issue here presented. The legality of the unions' economic weapon—a strike—is unchallenged. The legality of the railroad's counter weapon —continuing operations with replacement personnel— is likewise unchallenged. But if the unions resort to a strike, clearly they must conduct it lawfully without force and violence. Similarly, if the railroad chooses to operate it must do so within the limits of the law. This is the balance struck by Congress for the railroad industry.

That Congress is the appropriate branch of Government to make this determination has been made clear repeatedly by this Court in such cases as *NLRB* v.

Insurance Agents Union, 361 U.S. 477 (1960), and *American Ship Building Co.* v. *NLRB,* 380 U.S. 300 (1965). In *American Ship Building* this Court rebuked the NLRB for denying use of the lockout to an employer because of its conviction that use of this deivce would give the employer "too much power", describing such action as

> "... the unauthorized assumption by an agency of *major policy decisions properly made by Congress.*" 380 U.S. at 318 (Emphasis supplied)

Congress has made just such a policy decision in the present case.

In support of its argument in the Court below, premised as it was on an extension of current NLRA cases beyond their holdings, the FEC contended that what is good policy under one Act must likewise apply to the other statute. The FEC hence argued (Appellant's [FEC's] brief to Court of Appeals, pp. 30-31) "that the public interest in interstate commerce by railroad is no greater or less than the public interest in interstate commerce in steel or automobiles." But Congress clearly took a different view when it legislated differently for the railroad industry. Clearly such differentiation on the part of Congress is neither arbitrary, unreasonable, nor beyond its power. *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U.S. 381 (1940).

V. DECISIONS OF COURT OF APPEALS IN THIS CASE AND IN FLORIDA EAST COAST RY. CO. v. BROTHERHOOD OF RAILROAD TRAINMEN, 336 F. 2d 172 (5 Cir. 1964), REPRESENT AN UNWARRANTED SUBSTITUTION OF JUDICIAL FOR LEGISLATIVE VIEWS ON PROPER ADJUSTMENT OF ECONOMIC BALANCE OF POWER IN RAILROAD INDUSTRY.

The carrier has placed great emphasis in the proceedings below on the necessity of avoidance of interruptions to interstate commerce. This is indeed a stated purpose of the Railway Labor Act and one which no one would deny was and is of fundamental importance in creating the national labor policy and in deriving appropriate solutions to the recurrent critical problems in labor management relations.

The policy formulating organ of our Government, with Constitutional responsibility to weigh the conflicting economic balance of interests in formulating basic Federal labor policy is, of course, the Congress. In considering the means to achieve the legislative purposes embodied in Section 1A of the Act, Congress had a broad spectrum of policy choice, ranging from compulsory arbitration to a completely *laissez faire* attitude toward the industry. The chosen vehicle was the Act's scheme of initial bargaining on changes proposed by the carrier and employee representatives, supplemented by periods of mandatory mediation, but without compulsory agreement as to the changes proposed.

Once all mandatory bargaining procedures have been exhausted, and if no agreement has been reached, the parties are free to implement the changes which have been properly proposed and fully and exhaustively bargained over. At this point, as to changes desired by the unions, since they obviously cannot unilaterally impose their desired modifications upon the carrier, resort must of necessity be made to overt

economic pressure in order to achieve their goals, *viz.*, a strike.

The carrier, however, is in a substantially different position. As to changes which have been properly proposed by the carrier and over which bargaining has been carried out under the Act, such changes may be implemented by the carrier unilaterally. As to changes proposed by the unions, the carrier is free not to implement them. In both situations, the conflict is subject to resolution in a contest of economic pressure within the confines of applicable law.

Throughout this litigation, the FEC has taken the position that once this impasse of economic conflict has been reached, the Railway Labor Act ceases to be an applicable statute, no longer limits the conduct of the parties, and continues in this state of suspended animation for the duration of the strike period. Since the Act is inapplicable, continues the carrier's argument, its "status quo" provisions are ineffectual during the period of a strike, and the carrier is free to continue operations in whatever manner it deems necessary, under any rates of pay, rules and working conditions which it desires. The collective bargaining agreements, according to this theory, are suspended for the duration of the dispute.

This "suspension" theory was expressly rejected, and properly so, by the Court of Appeals, Fifth Circuit, in *Florida East Coast Railway Co.* v. *Brotherhood of Railroad Trainmen,* 336 F. 2d 172 (CA 5, 1964), *certiorari denied,* 379 U.S. 990 (1965), in the following manner:

> "It is clear that the suspension argument has no merit. The BRT is still the bargaining repre-

sentative of all the employees in the crafts of trainmen and yardmen whether union members or not. Steele v. L. & N. R.R., 1944, 323 U.S. 192, 65 S.Ct. 226, 89 L. Ed. 173. The employees of FEC are entitled to the benefit of the terms of the agreement, and the FEC may not supersede the agreement by individual contracts, whether consented to by the employees or not. Telegraphers v. Ry. Express Agency, 1944, 321 U.S. 342, 346, 64 S.Ct. 582, 88 L. Ed. 788." 336 F. 2d at 180.

If, as the FEC contends, the Act is inapplicable, may it enter into individual yellow-dog agreements with its employees, as expressly prohibited by Section 2, Fifth, 45 U.S.C. § 152, Fifth, of the Act? What other mandatory provisions are to be deemed "suspended" during a strike? Surely, the Court of Appeals was correct in rejecting any doctrine of suspension urged upon it in the *Trainmen's* case, *supra,* and repeated in the present case. Congress' scheme for the settlement of railway labor disputes should not be "suspended" during the very period when economic conflict over properly processed contract changes rages. Where impasse has been reached as to particular changes, to permit wholesale sweeping changes in all contract provisions, even under the cloak of a temporary "emergency" could only serve to exacerbate and prolong the "emergency" if indeed not convert the "emergency" into a semi-permanent state of affairs as witness the present case.

The Court of Appeals in the *Trainmen's* case, having rejected the "suspension" idea, engaged, however, in a classic example of judicial creation. This Court had stated in *Brotherhood of Locomotive Engineers* v. *B.*

& O. R. Co., 1963, 372 U.S. 284, in considering a rail labor dispute of national scope:

> "* * * What is clear * * * is that both parties, having exhausted all of the statutory procedures, are relegated to self-help in adjusting this dispute." 373 U.S. at 291.

Unquestionably, the parties are left to self-help to resolve the particular dispute. The content, scope, and limitations on this "self-help" in the light of the Railway Labor Act is the question remaining.

The Court of Appeals in the *Trainmen's* case, reasoned in the following manner: (336 F. 2d at 181)

> "Indeed, the unquestioned right to resort to self-help is the inevitable alternative in a statutory scheme which deliberately denies the final power to compel arbitration.
>
> * * *
>
> "Since the right surely exists, the law must accommodate itself to the exercise of this power in a way that will make it effectual. Brotherhood of Railroad Trainmen v. Chicago R. & I. R.R., 1957, 353 U.S. 30, 40, 77 S.Ct. 635, 1 L. Ed. 2d 622. Anything less either temporizes with the so far determined policy against compulsory arbitration, or puts the full weight of the law on the side of the employees by making it impossible for the Railroad to carry on save on the terms and conditions imposed by the organized employees who now refuse to perform as agreed.
>
> "* * * when the machinery of industrial peace fails, the policy in all national labor legislation is to let loose the full economic power of each. On the side of labor, it is the cherished right to strike.

On management, the right to operate, or at least the right to try to operate.

* * *
* * *

"But this right of self-help is not a license for wholesale abrogation of the agreement. As the term implies, it is help which is reasonably needed to meet the impasse of a railroad desiring to run and unions unwilling to furnish workers * * *.

"Although we do not here decide what changes may be reasonably necessary in light of the strike conditions, we hold that in a situation of this sort, it falls to the lot of the District Judge to pass on *which changes are in fact necessary in order for FEC to continue to operate* * * *.

* * *

"We restate * * * it [FEC] is, however, free to institute and maintain such employment practices, etc., as are, and continue to be, reasonably necessary *to effectuate its right to continue to run its railroad under strike conditions* * * *." 366 F. 2d at 181-182. (Emphasis added.)

Careful analysis of the foregoing opinion reveals that during the course of the reasoning, the carrier's right to self-help becomes a "right to continue to run its railroad under strike conditions" and exceptions must be created in mandatory federal labor legislation in order to effectuate this right of operation. In essence this opinion grants leave to a federal district judge to effectuate the carrier's "right of operation", and, as a necessary corollary thereto, to render ineffectual the workers' "cherished right to strike".

Employees are free to *engage* in a lawful strike, but obviously they have no federal right to such statutory

exceptions as may be "reasonably necessary" in order for them to be *successful* in a strike. By this opinion, however, followed and repeated in the present case and indeed referred to as "the law of the case", 348 F. 2d at 686, a carrier now has a right to such statutory exceptions as are "reasonably necessary" in order, in essence, to break the strike. For if the carrier has a federally protected right "to run * * * under strike conditions", then the whole idea of striking is rendered sterile. What the Fifth Circuit has done in fact is to abolish the union's "cherished right to strike" without supplying compulsory arbitration in its place.

The evils which the Norris-La Guardia Act, 29 U.S.C. § 101 et seq., sought to remedy are here introduced in a new and virulent form. It becomes the duty of the District Judge to allow such changes, although prohibited by the Act, as may be "reasonably necessary" to insure the carrier's continued operations.

No provision of law confers a "right" to a carrier to continue in operation under strike conditions, any more than the union has a "right" to stop the carrier from operating. The union has a right to attempt to halt operations through peaceful and lawful means, and the carrier has a right to *attempt* to continue operations with replacement personnel, through peaceful and lawful means.

To require federal district judges to exempt a carrier from mandatory federal legislation, is to introduce a new and seriously disrupting element into the delicate balance of economic relationships. This "exception" doctrine is neither contemplated by the statutory machinery nurtured and created over a long span

of time, nor does it claim any basis in the voluminous legislative history of the Act.

The doctrine promises to produce the greatest court-shopping expedition since *Swift* v. *Tyson,* 1842, 16 Pet. 1, was overruled. See *Erie R. Co.* v. *Tompkins,* 1938, 304 U.S. 64 at 74-75. At the mere threat of strike action, carriers will be encouraged to seek out a court they think entertains views as to what is "reasonably necessary" most in accordance with those of its management. Courts will again became active protagonists in all railway labor disputes. If strike conditions become too onerous, there will always be a more palatable alternative to settling the strike—apply to the courts for exemption from the criminal and civil prohibitions of the Railway Labor Act. If successful, the strike then need never end, and the longer it lasts the more benefit accrues to the carrier.

The carrier in the courts below and in the present case contends that if this Court rejects the "suspension" and "reasonably necessary" exceptions doctrines, it will become impossible for a struck carrier to continue in operation, thus affording the unions an invincible bargaining advantage and maximizing the disruption of commerce which results from a strike situation.

As in any industry requiring a large supply of highly-skilled workmen, a strike in the rail industry will impose a substantial problem to a management seeking to continue its full operations in the face of the strike. The requirement of continuing in effect the contractually determined pay rates, rules and working conditions required by the Railway Labor Act may well impose an additional problem. But this does not

mean that operation is impossible. Fewer trains operated under the contractual conditions may well be the result of the unsuspended unexcepted application of the Railway Labor Act under strike conditions. Certainly this would be the result when compared to operation under any conditions which management might care to apply, or when "exceptions" are granted to assist the carrier by a federal court.

Operation is not impossible merely because the carriers assert it. The fact that the FEC abrogated all of its bargaining agreements in resuming operations does not mean that it would have been impossible for it to have continued in reduced service abiding by the contracts. The carrier's chief witness, R. W. Wyckoff, conceded as much (R. 330).

And it seems quite clear that in such event a strike of long duration would be highly unlikely. With both parties suffering from the dispute in direct proportion to its duration, some middle ground for compromise and settlement before too long would almost always be found. This, we submit, is the underlying premise of the statute's provisions. Congressional wisdom in this regard appears far more likely to prevent disruption of interstate commerce than the "ill-adapted judicial interference" of the Court below. See Frankfurter, J., dissent, *Elgin J. & E. Ry. Co.* v. *Burley*, (1945), 325 U.S. 711, 752. Certainly, the fact that this dispute continues unabated as the longest in American railroad history is no testimonial to the efficacy of the "reasonably necessary" exceptions doctrine in resolving strikes.

VI. "REASONABLY NECESSARY" EXCEPTIONS DOCTRINE, IF ADOPTED, SHOULD BE GOVERNED BY EQUITABLE PRINCIPLES IN HARMONY WITH THE PROVISIONS OF THE RAILWAY LABOR ACT AND THE NORRIS-LA GUARDIA ACT; ITS BENEFITS SHOULD NOT BE AVAILABLE TO A PARTY THAT HAS REJECTED VOLUNTARY ARBITRATION AND VIOLATED THE RAILWAY LABOR ACT'S PROCEDURES.

If this Court should adopt the "reasonably necessary" exception doctrine enunciated by the Court of Appeals in the *Trainmen's* case and followed in the present case petitioners alternatively suggest that application of such doctrine should be made to conform and harmonize in its operation with general equitable principles and with this Court's ruling in *Brotherhood of Railroad Trainmen* v. *Toledo, P. & W. R.R.,* 321 U.S. 50 (1944). This Court in that case unanimously held that the services of a federal court of equity, even in the traditional form of an injunction against violence, were not available to a railroad which had repeatedly rejected arbitration and thereby failed in its duty to make "every reasonable effort" to settle the dispute involved, a duty mandatorily imposed by Section 2, First, of the Railway Labor Act, 45 U.S.C. 152, and one which Section 8 of the Norris-La Guardia Act expressly makes a condition to the granting of equitable relief in a case arising out of a labor dispute, 29 U.S.C. 108. There, as here, both the striking unions and the railroad had initially rejected arbitration after exhaustion of the Railway Labor Act's procedures. There, as here, the dispute arose out of differences between the parties as to rates of pay and working conditions. There, as here, the dispute was "long-continued". There, as here, the unions (after the bombing of Pearl Harbor) changed their position in regard to arbitration and acceded to the National Mediation

Board's request for arbitration. There, as here, the railroad persisted in its refusal to accept arbitration.

Under these circumstances this Court held that the railroad's refusal to submit to voluntary arbitration precluded it from seeking the aid of injunctive relief from a federal court even against violence and other unlawful conduct. As the Court there stated (321 U.S. at 63):

> "Respondent is free to arbitrate or not, as it chooses. But if it refuses, it loses the legal right to have an injunction issued by a federal court, or to put the matter more accurately, it fails to perfect the right to such relief. This is not compulsory arbitration. It is compulsory choice between the right to decline arbitration and the right to have the aid of equity in a federal court."

Where the right to secure traditional equitable relief in the form of an injunction or temporary restraining order is precluded due to the continued intransigence of a carrier, surely the right to such extraordinary equitable relief as is here involved must be similarly precluded. The doctrine of "reasonably necessary" exceptions from mandatory federal legislation touches the outer limits of equitable discretion and power, and should not lightly be granted to an applicant with manifestly "unclean hands."

The factual background of this long-enduring labor dispute is, as described in the introductory statements herein, replete with willful, deliberate, and repeated violations of federal law and court orders by the FEC. To reward such a corporate scofflaw with extraordinary equitable relief would violate every traditional equitable notion.

Petitioners respectfully submit that the FEC in this case therefore should be barred from seeking the aid of this Court, and of the courts below, to grant it "reasonably necessary" exceptions from the Railway Labor Act's requirements in order to continue to operate under strike conditions. FEC has clearly refused, again and again, all requests to arbitrate this dispute (Exh. Vol., pp. 458-459, 460-461). Yet FEC is asking this Court, and the courts below, to relieve it from other onerous obligations imposed by the Railway Labor Act. Clearly under the holding and rationale of the *Toledo* case, as well as traditional principles of equity, such relief is not available to the FEC. This Court should limit the relief available under the Court of Appeals' doctrine of "reasonably necessary" exceptions to carriers who have substantially complied with existing federal law, if the doctrine should be adopted at all.

CONCLUSION

As has been said of the Norris-La Guardia Act, the Railway Labor Act is "the culmination of a bitter political, social, and economical controversy extending over half a century." *Milk Wagon D. Union* v. *Lake Valley F. Products,* 311 U.S. 91, 102 (1940). The delicate task of tampering with its machinery so as to adjust the balance of economic power which the Act strikes to suit judicial notions of fairness is risky business. That is a job for Congress. The courts are ill-equipped for such work. The judicial tailoring of the Railway Labor Act here attempted by the Court of Appeals after 40 years of the Act's relative success and in the face of prospective nationwide difficulties, can only be deemed ill-advised. The fullest measure

of labor peace in the railroad industry can only be assured by taking Congress at its untrammeled, unexcepted word. Untold strife in the coming difficult period of readjustment to technological advancements would be the result of this Court's holding that anything less than full enforcement of the "status quo" provisions satisfies the statutory scheme.

Where judicial exceptions can be spun out of whole cloth to effectuate the success of the economic weapons of one of the disputants engaged in battle, little hope for the settlement of disputes prior to this ultimate battle can be envisioned.

The decision of the Court of Appeals permitting judicial suspension of the Railway Labor Act's requirements should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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